

FUNDAMENTALS OF TRIAL ADVOCACY COURSE

October 5 – 8, 2020
Phoenix, Arizona



DIRECT EXAMINATION

Presented by:

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Distributed by:

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL
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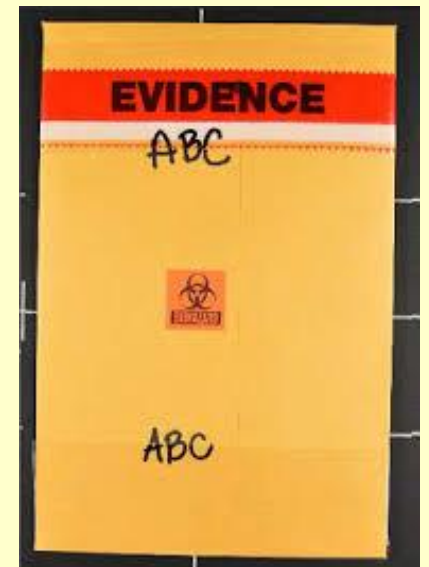
ELIZABETH BURTON ORTIZ
EXECUTIVE DIRECTOR

DIRECT EXAMINATION



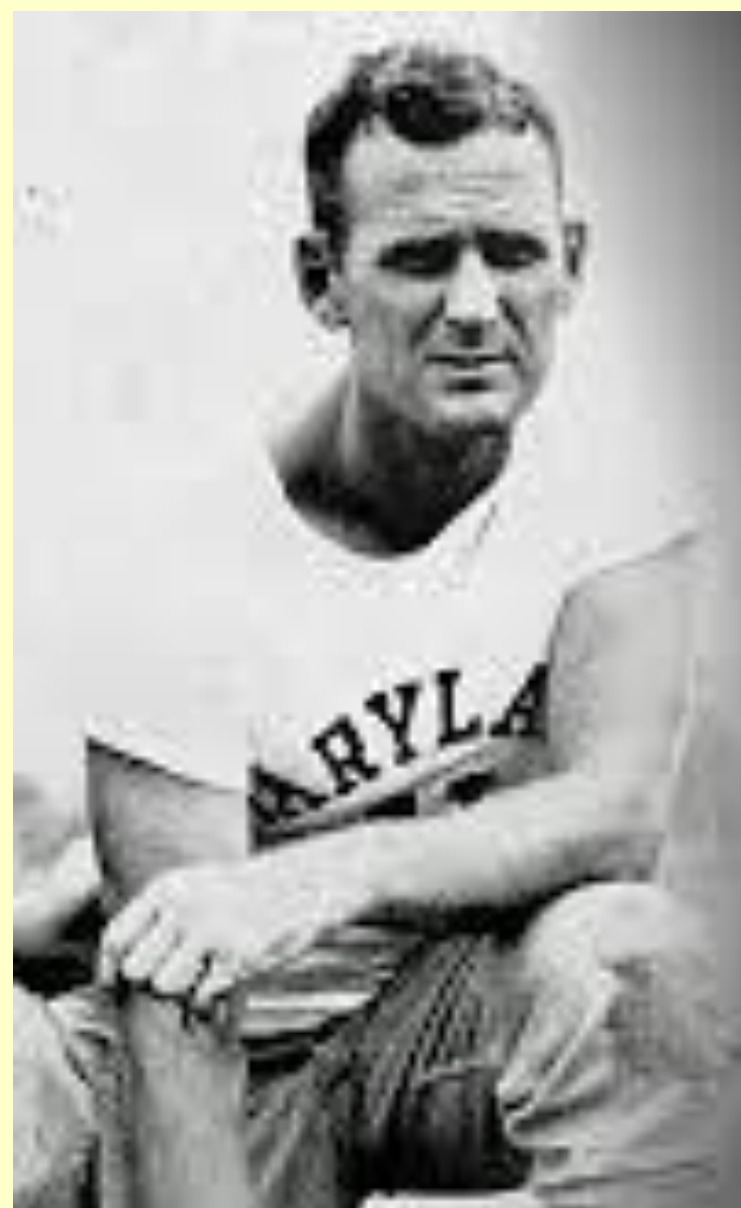
Goals of Direct Exam

- Make the jury understand the story of the case
 - Memorable images
- Establish the elements of the charged offenses
- Admit physical, photographic, and other evidence to support the case
- Address the defense theory of the case
- Eliminate confusion



A Conversation About Direct Examination





It's not the will
to win that matters -
everyone has that.
It's the **will to prepare**
to win that matters.

— Bear Bryant

AZ QUOTES

Preparation: Your closing argument and why

Forces you to know your case...which in turn



Forces you to identify which witnesses you want (*not just need*)... which in turn



Forces you to identify which exhibits you want (*not just need*)... which in turn



Forces you to identify the testimony, you need to elicit, i.e. the questions you need to ask and exhibits to admit into evidence

PRE-TRIAL PREPARATION

- **Witness List and preferred order in which you want to call them**
 - Chronological
 - Foundation (example impounding officer before forensic scientist)
 - Estimate length of testimony
- **Make an Evidence/Exhibit List**
- **Contact witnesses**
 - Vacation or work schedules
 - Discussion about necessity of testimony
- **Subpoenas**
- **Create Outline/Questions for each witness**
- **Arrange for transportation of impounded evidence**
- **Mark Your Exhibits**

Choose your Organization

Organize Your Outline

- Include all elements
 - Jurisdiction
 - Identification
 - Exhibits
- By Chronology
 - The Three Pass Method
- By Issue?
 - Categories of forensic evidence
 - Categories of investigation

Organizing on the day of Testimony

- Put exhibits in order
- Never, ever be disorganized with exhibits

EXHIBIT LIST

ADMIT	EXHIBIT	ITEM	EVIDENCE
		01MA (Ali #3481)	Audio interview
10/12/13	1	1JWS (Siefferman #4014)	Corona Elite bottle from parking stall from north parking line
		2JWS	One swab of blood from south side parking stall
10/12/13	2	3JWS	Corona Elite bottle from parking stall
10/12/13	3	4JWS	Nike tennis shoes, socks, received from officer Skaggs
10/12/13	4	5JWS	White t-shirt received from officer Skaggs
10/12/13	5	6JWS	Dickies pants from Ismael Leon
10/12/13	6	7JWS	Blue and white shirt from living room couch (apt. # 29)
10/12/13	7	8JWS	"Zoo York Unbeatable" jacket from living room couch (apt. # 29)
10/12/13	8	9JWS	Rosary necklace from top of television (apt. # 29)
10/12/13	11	10JWS	Mossberg model 590, serial #T822574 and three 12 gauge shells
		11JWS	Trace DNA swabs from shotgun grip and pump rib
		12JWS	Trace DNA swabs from Corona Elite bottle #1JWS
10/15/13	38	13JWS	Latent lifts from #1JWS
		14JWS	Trace DNA swabs from Corona Elite bottle #3JWS
10/15/13	39	15JWS	Latent lifts from #3JWS
		16JWS	Swab of red blood-like substance from #4JWS
10/12/13	10	17JWS	Brass knuckles received from Det. <u>Bowlin</u>
		18JWS	Trace DNA swabs from #17JWS
10/12/13	9	19JWS	Blue belt with blood on it from Det. <u>Bowlin</u>
		20-A-JWS	2002 Chevy 1500 truck (owner Rogelio Enriquez)
10/12/13		20-B-JWS	Keys to Chevy 1500 truck
10/12/13	12	21JWS	Spent shell casing, Dodge Neon dash
10/12/13	13	22JWS	Spent shell casing, Dodge Neon pass. floor
		23JWS	Green leafy substance in <u>Similac</u> can, Dodge Neon center console
		24JWS	Electronic scale, Dodge Neon center console
		25JWS	Swab of blood, front edge left rear pass. door
10/12/13	14	26JWS	Spent shell casing, left back pass. floor under driver's seat
		27JWS	Swab of red blood-like substance, lower front driver's door panel
10/15/13	40	28JWS	Latent lifts, front pass. door
		29-A-JWS	2003 Dodge Neon (owner Michael Martinez)

TRIAL OUTLINE

COLIN BRANDHORST

- Name
- Employment
- Education
- Training and experience
- Items received on 3/1/12:
 - #10JWS: Mossberg 12 gauge shotgun
 - #13JWS: five latent lift cards ("Corona Elite bottle #1JWS") (labeled L1 – L5)
 - #15JWS: four latent lift cards ("Corona Extra bottle north side parking stall #3JWS") (labeled L6 – L9)
 - #28JWS: four latent lift cards ("pass. exterior door post") (labeled L10 – L13)
 - #2WCC: One set of major case prints (4 cards) each bearing the name Ismael Leon Jr.
 - #3WCC: One set of major case prints (4 cards) each bearing the name Jaime Martinez
- Examination requested: latent prints

Item #10JWS: latent prints from Mossberg shotgun

- Item #10JWS was processed at the lab on 3/14/12.
 - DNA taken by Dayere Jackson.
 - Latent prints of value for comparison were developed.
 - Photos 001 - 007

- One latent print (from #10JWS) was compared to livescan palmprint cards bearing the names Ismael Leon and Jaime Martinez obtained from DPS files/OPPIS.
 - Where do OPPIS prints come from? *Variety of sources*
 - Identified with name, DOB and other identifying info?
- The latent from #10JWS (photo 005) was identified as having been made by Ismael Leon (left palm).
- Attempt to develop latent prints from three shotgun shells included with #10JWS?
 - #10JWS-2
 - #10JWS-3
 - #10JWS-4

Item #13JWS: latent prints from Corona Elite bottle #1JWS

- 4 latent prints on 3 different lift cards were identified as having been made by Jaime Martinez.
 - L1-A: #3 finger
 - L2-A: #2 finger
 - L3-A: #3 finger
 - L3-B: #4 finger
- Additional latent prints were not of value for identification and were not compared.

Item #15JWS: latent prints from Corona Extra bottle north side parking stall #3JWS

- 1 latent print was identified as having been made by Jaime Martinez.
 - L6-A: #2 finger
- Additional latent prints were not of value for identification and were not compared.

Item #28JWS: latent prints from pass. exterior door post

- 1 latent print was identified as having been made by Jaime Martinez.
 - L12-A: #2 finger
- Additional latent prints were not of value for identification and were not compared.

Item 2WCC: major case print cards for Ismael Leon Jr.

- On ____, compared Item 2WCC to OPPIS prints for Ismael Leon. Identified as having been made by the same person.

Item 3WCC: major case prints for Jaime Martinez

- On ____, compared Item 3WCC to OPPIS prints for Jaime Martinez. Identified as having been made by the same person.
- Technical review of your work?

Officer Adrian Barrios

■ Background

- 7 years PPD
 - Assignments
- Prior federal experience
- Training/Experience
 - Drug cases

■ December 5, 2012 around 3:20 p.m.

- Responded to an emergency call related to a physical fight
 - Location given was 2811 W. Thomas Road (Napa Auto Parts store)
- Caller said people were fighting in a white Cadillac Escalade
 - Gave a specific license plate number
- Found the Cadillac Escalade at 2775 W. Thomas Rd. in Phoenix (just next door)
 - Maricopa County
 - In front of a Cricket cellphone store
 - Parked in handicap spot
 - There was only one person in the vehicle (front passenger seat)
 - Alisha Ingrahm
- Alisha Ingrahm
 - Appeared to be crying
 - Had several red marks on her right cheekbone
 - Lipstick smeared on her face and on her chest
 - Asked her if she was ok and to face him
 - She said, "He did not hit me. It was all my fault"
 - Asked her for more details
 - She insisted she was fine and did not need police assistance
- Asked for another officer to assist him with contacting her boyfriend inside the Cricket store

Witness Preparation

- The better practice is to have already met with your witnesses prior to the start of trial
- Lay witnesses are often nervous, police officers often unprepared
- Explain to your witnesses that your expectation is simply that they tell the truth
- Show pictures and play recordings for witnesses ahead of time
 - Defense interviews may provide an opportunity
- Instruct the witness on areas to avoid
 - Even if they should know better
- If possible do a courtroom visit
 - This is a must for children

Thoughts on Witness Preparation

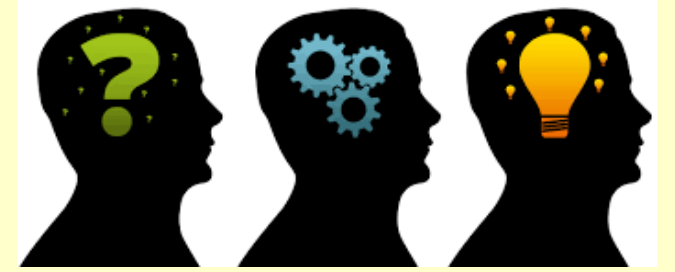
- The ethical distinction between discussing testimony vs. influencing testimony
- What may be proper witness preparation for a civil attorney could be problematic for prosecutors at trial
- Prosecutors should always remind the witness:
 - Be truthful
 - Listen carefully to the question
 - Wait until the entire question is asked before answering
 - If you didn't understand the question, ask for clarification
 - Don't guess. If you don't know or remember, then simply say so

To Lead or Not to Lead

Rule 611(c)

Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:

- (1) on cross-examination; and
- (2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.



Three Main Learning Styles

Most people learn best through a combination of the three types of learning styles:

1) Auditory Learners: Hear

Auditory learners would rather listen to things being explained.

2) Visual Learners: See

Visual learners learn best by looking at graphics, watching a demonstration, or reading.

3) Kinesthetic Learners: Touch

Kinesthetic learners process information best through a “hands-on” experience.

Three Pass Method

- ❑ Learning by more than one method
- ❑ People process information in different ways. To ensure you are conveying the information to the jury, you want the jurors to understand the information from different perspectives.

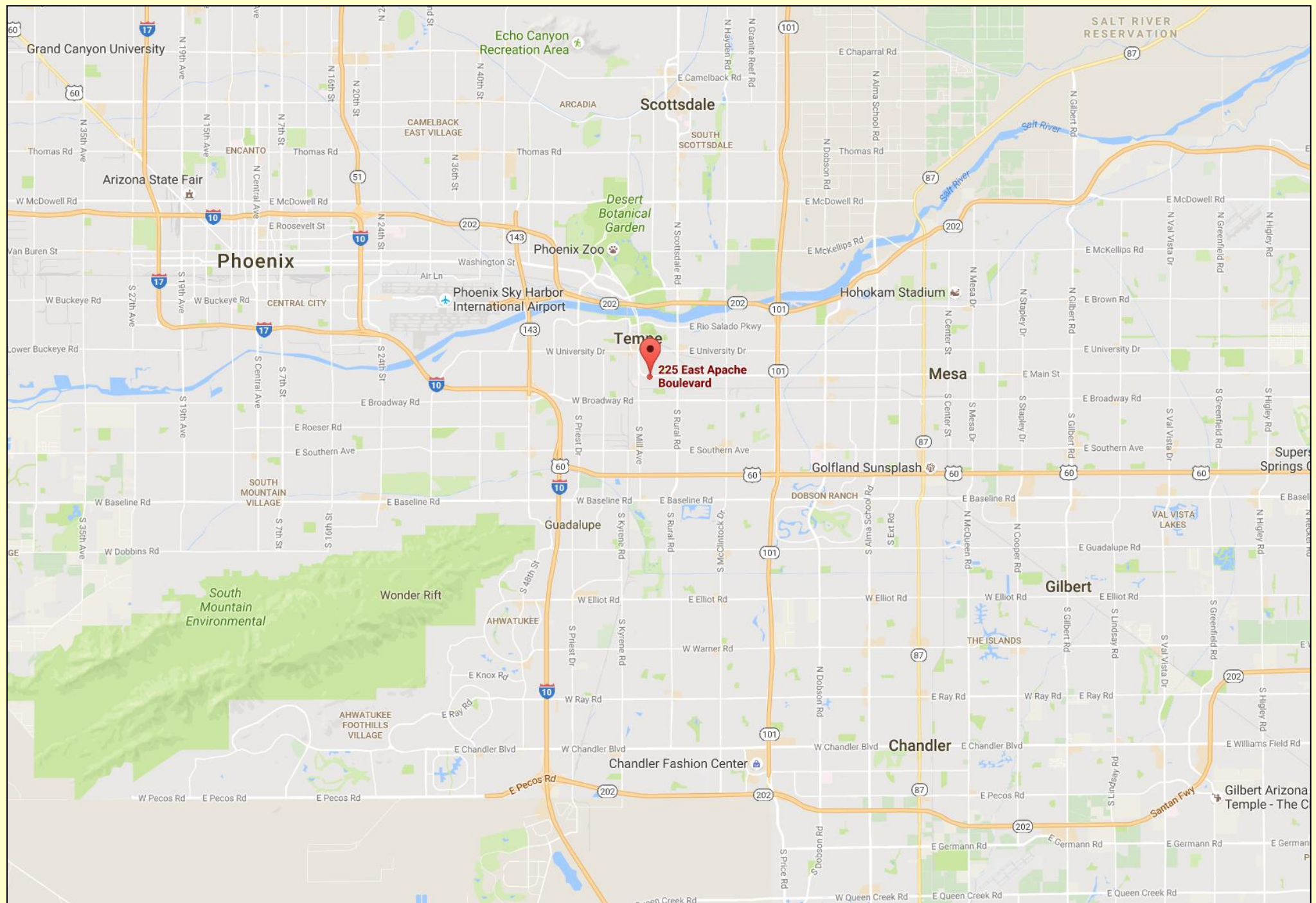


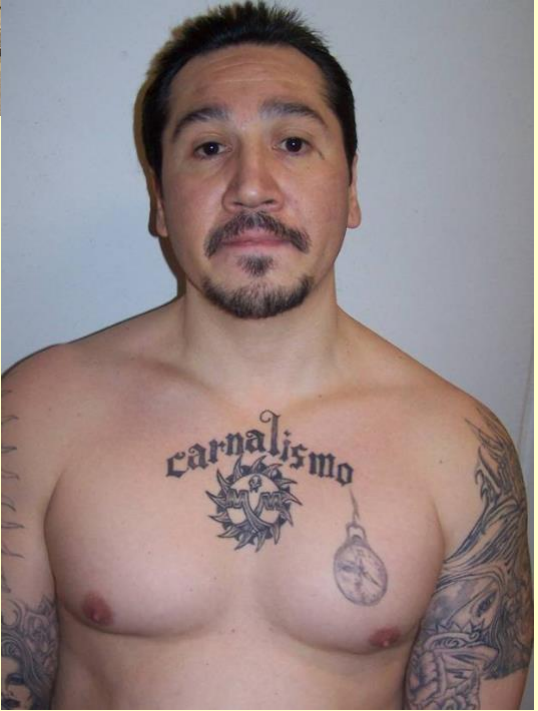
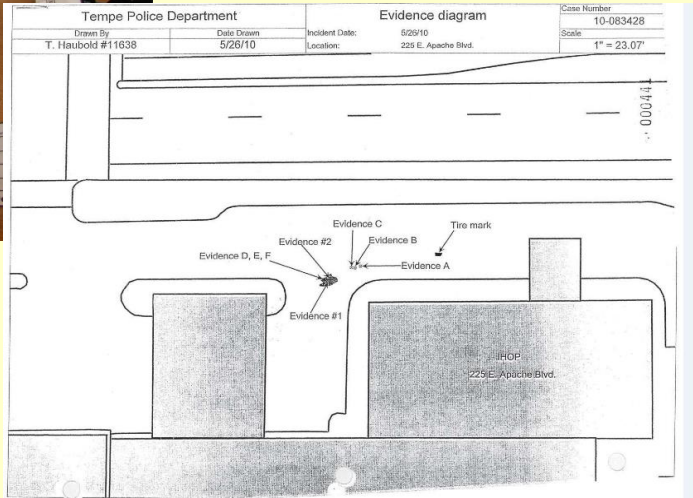
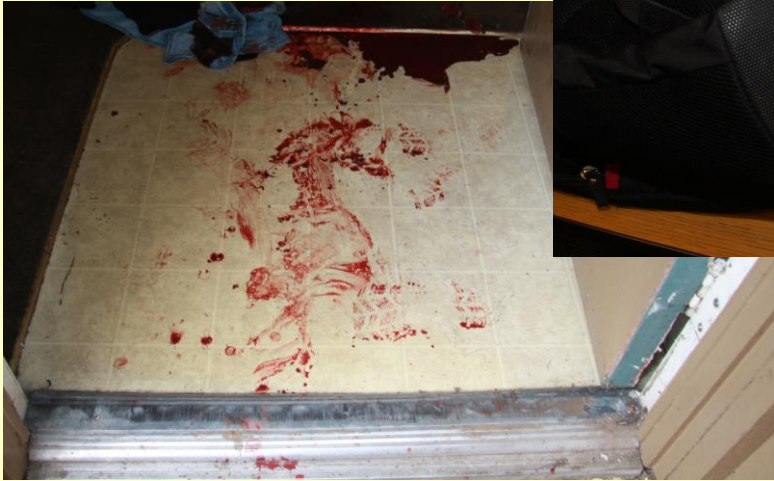
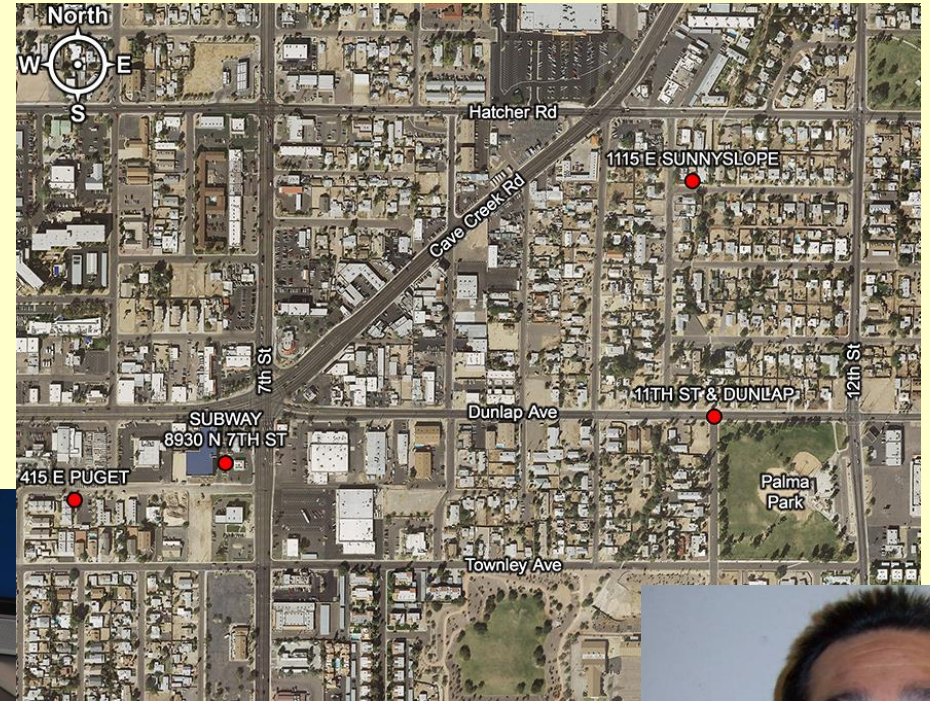
FIRST PASS – “Tell me...”

- Allow the witness to tell the story of their involvement in the case through **open-ended questioning**
 - Think of this as an inverted triangle. Start general, narrow to specific
- Work with the witness prior to testimony to be prepared to overview what the witness did, saw, and heard. This gives the jury a verbal overview of the witness's testimony.
- Helpful to auditory learners
- **Don't be afraid of the narrative objection!**

SECOND PASS – “Show me...”

- Use maps, diagrams, and photographs to have the witness show the jury what they told them during the First Pass
- Allow the witness to demonstrate actions, distances, posture, etc.
 - Use the courtroom (i.e. “was the defendant standing as close to you as I am?”)
- This is your chance to have the witness fill in details and give descriptions which may have been missed in their narrative
- Helpful to visual learners





THIRD PASS – “Hands on...”

- Allow the jury to see and (if appropriate) physically handle your physical evidence in the case
- Examples:
 - Racking the gun
 - Swinging the bat
 - Holding the knife
- Helpful to kinesthetic learners

#1 TALK LIKE A NORMAL HUMAN BEING

- Stop using cop talk and Stop talking like a lawyer. Right Now!
 - The evidence will not “indicate” or “establish” it will show or prove
 - Do not “please the court”
 - The officer was not in a **patrol vehicle**, she was in a **police car**
 - He did not **exit** the building, he **left** the building
 - The victim did not **notify** or **contact** the police, he **called** the police
 - Other examples:

Legalese

communicated
observed
documented
prior to

English

said
saw
wrote down
before

- No juror cares what the officer’s badge or “serial” number is, why do you?

#2 Use Topic Sentences or Headlines

- Introductory phrases
- Transitional Phrases
- “Looping” Phrases
 - Guide the witness and Orient the Jury
 - These phrases are like signposts or signals
 - Keeps witness on track and on topic



#2 Use Topic Sentences or Headlines

- **Introductory Phrases**

- I want to talk with you about _____
- I'd like to ask you some questions about _____
- "I'm going to ask you about what happened during the fight, but first I want you tell the jury what you were doing at the store that day"
- "I want to now focus on how you know the defendant. When did you first meet him?"

#2 Use Topic Sentences or Headlines

- **Transitional Phrases (usually date, time, and place)**
 - Now that you've told us about that evening, I want to move on to the next morning...
 - Let's switch to what happened while you were in the store...
 - Focusing your attention on...
 - We've talked about your training, now I'd like you to tell us about...
 - Now I want to focus on how you know the defendant. When did you first meet him?"

#2 Use Topic Sentences or Headlines

- **Looping Technique**
- Helps reinforce important testimony from the witness by using it in your next question
- Example:
 - After you saw the Defendant grab the knife and turn towards you, what happened next?
 - When the defendant pointed the gun at you, what was going through your mind?

#3 Drawing the Sting

- Do not be afraid of bad facts; address them with your witnesses
- Accuracy is more important than Advocacy
- You will rightfully lose credibility if you omit the harmful facts
- When choosing where to place your bad facts within your examination
 - Remember primacy and recency

#4 Teach the Jury through the Witness

- The focus must be on the witness, not you
- Use visual language in the question and present tense when appropriate
 - So you're behind the counter, with a gun pointed at your face, how did you react when the defendant said empty the drawer?
- It's a conversational interview where the witness is the star
- Use open ended questions
 - "Why did you do that?"
 - "Tell us what you did?"
 - "What were you thinking when...?"
 - "How did it feel...?"
 - And of course "What happened next?"

#5 Emphasize the Key Points

- USE. YOUR. VOICE!
 - Volume
 - Inflection
 - Pauses
- Flipchart
 - Important information
- Looping
- Have the witness stand and explain key documents, etc.
- Signal words:
 - “Bottom line, did you...”
 - “So let’s make sure we’re totally clear, did you ever”

#6 Listen to the Witness

- Just like a conversation, you have to listen
- Maintain eye contact
- Be careful with scripts and prepared to deviate from outline

DRIVING ON A SUSPENDED LICENSE

NAME _____
HOW ARE YOU EMPLOYED? _____
WERE YOU SO EMPLOYED ON _____?
AT APPROXIMATELY _____ AM/PM, WERE YOU AT OR NEAR _____
WHAT WERE YOU DOING AT THAT LOCATION? _____
IS THAT IN MARICOPA COUNTY? _____
IS THAT WITHIN THE JURISDICTION OF THIS COURT? _____
ON THAT DATE, DID YOU NOTICE A _____?
WHAT BROUGHT YOUR ATTENTION TO THAT VEHICLE? _____

Q: What's the score of the game?

A: zero to zero

Q: Who's winning?

Ferris Bueller's Day Off

Q: She had three children, right?

A: Yes

Q: How many were boys?

A: None

Q: Were there any girls?

#7 Be Prepared to Refresh Recollection

- Police reports
- Recordings
- Photographs
- Transcripts
- Read Rule 612, Ariz. R. Evid.

#8 Be Prepared to Impeach

Rule 607. Who May Impeach a Witness

Any party, including the party that called the witness may attack the witness's credibility.



“By failing to prepare,
you are preparing to
fail.”